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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-45

GERALD A. LEWIS, Comptroller of the State of Florida, and Commissioner of Banking of the State of Florida,

Appellant,

v.

BT INVESTMENT MANAGERS, INC. and BANKERS TRUST NEW YORK CORPORATION,

Appellees,

On Appeal From The United States District Court, Northern District of Florida, Tallahassee Division

BRIEF FOR THE APPELLEES

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INDEX

	Page
Opinions Below	1
Jurisdiction	1
Constitutional Provision, Statutes and Rules Involved	2
Questions Presented	3
Statement of the Case	3
Summary of Argument	9
Argument	14

Argument:

I. The Challenged Statutes, Both Individually and In Combined Effect, Overtly Discriminate Against Interstate Commerce Based Solely Upon Factors of Out-Of-State Origin, and Are Therefore *Per Se* Unconstitutional. 14

A. The challenged portions of the Florida Statutes which exclude out-of-state bank holding companies from performing trust or investment advisory services through Florida subsidiaries violate the Commerce Clause of the United States Constitution. 14

B. Section 660.10, Florida Statutes, is, by itself, patently discriminatory against out-of-state corporate fiduciaries, and places an impermissible burden on Interstate Commerce. 25

	Page
II. The Admitted Discrimination of Section 659.141(1), Florida Statutes, Against Interstate Commerce Is Clearly Not Authorized By The Bank Holding Company Act	31
Conclusion	50
Proof of Service	51
Appendix:	
1. Fla. Stat. § 659.141(1) (1972 Supp.)	A-1
2. 12 U.S.C. § 1841(b) and (c) (1976)	A-1
3. 12 U.S.C. § 1842 (1976)	A-2
4. 12 C.F.R. § 225.4(b)(1) (1978)	A-2

TABLE OF AUTHORITIES

Cases:	Page
Baldwin v. *G.A.F. Seelig,* 294 U.S. 511 (1935)	14
Braeburn Securities Corporation v. *Smith,* 15 Ill. 2d 55, 153 N.E. 2d 806 (1958)	19
BT Investment Managers, Inc. and Bankers Trust New York Corporation v. *Lewis,* 559 F.2d 950 (5th Cir. 1977)	6,8
BT Investment Managers, Inc. and Bankers Trust New York Corporation v. *Lewis,* 461 F. Supp. 1187 (N.D. Fla. 1978)	*passim*
Carter v. *Carter Coal Co.,* 298 U.S. 238 (1936)	28
Crutcher v. *Kentucky,* 141 U.S. 47 (1891)	28
Detroit Automotive Purchasing Services, Inc. v. *Lee,* 463 F. Supp. 954 (D.Md. 1978)	23,26
Diversified Brokerage Services, Inc. v. *Greater Des Moines Board of Realtors,* 521 F.2d 1343 (8th Cir. 1975)	20
Ernst & Ernst v. *Hochfelder,* 425 U.S. 185 (1976)	12,32
Exxon Corporation v. *Governor of Maryland,* 437 U.S. 117 (1978)	*passim*
Fain v. *Hall,* 463 F. Supp. 661 (M.D. Fla. 1979)	12,29,30,31
Great Atlantic & Pacific Tea Company v. *Cottrell,* 424 U.S. 366 (1976)	29
Great Western United Corp. v. *Kidwell,* 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds,* ——— U.S. ———, 99 S. Ct. 2710 (1979)	19,44,45

	Page
H. P. Hood & Sons, Inc. v. *DuMond*, 336 U.S. 525 (1949)	14
Hughes v. *Oklahoma*, —— U.S. ——, 99 S.Ct. 1727 (1979)	17,23,24
Katzenbach v. *McClung*, 379 U.S. 294 (1964)	19
National Couriers Association v. *Board of Governors of the Federal Reserve System*, 516 F.2d 1229 (D.C. Cir. 1975)	49
National State Bank of Elizabeth, N. J. v. *Smith*, 591 F.2d 223 (3d Cir. 1979)	34
Paul v. *Virginia*, 75 U.S. (8 Wall.) 168 (1869)	27
Philadelphia v. *New Jersey*, 437 U.S. 617 (1978)	*passim*
Pike v. *Bruce Church, Inc.*, 397 U.S. 137 (1970)	*passim*
Railway Express Agency v. *Virginia*, 282 U.S. 400 (1931)	27,28
United States v. *Oregon State Medical Society*, 343 U.S. 326 (1952)	20
United States v. *South-Eastern Underwriters Association*, 322 U.S. 533 (1944)	20,27
Whitney National Bank v. *Bank of New Orleans & Trust Company*, 379 U.S. 411 (1965)	43
Wickard v. *Filburn*, 317 U.S. 111 (1942)	19
Constitutional Provisions, Statutes and Regulations:	
U.S. Const. art. I, § 8, cl.3 (Commerce Clause).	*passim*
12 U.S.C. § 27	21

	Page
12 U.S.C. § 1841	3,33,41
12 U.S.C. § 1841(b)	33
12 U.S.C. § 1841(c)	33
12 U.S.C. § 1842	*passim*
12 U.S.C. § 1842(d)	*passim*
12 U.S.C. § 1843	*passim*
12 U.S.C. § 1843(c)(8)	4
12 U.S.C. § 1846	*passim*
15 U.S.C. § 77a	20
15 U.S.C. § 77aaa	20
15 U.S.C. §78a	20
15 U.S.C. § 79	20
15 U.S.C. § 80a-1	20
15 U.S.C. § 80b-1	20,21
Pub. L. No. 89-485, 80 Stat. 236 (1966)	41
Pub. L. No. 95-630, § 1504, 92 Stat. 3641 (1978)	21
12 C.F.R. § 225.4(a)(4) (1978)	4
12 C.F.R. § 225.4(a)(5) (1978)	4
12 C.F.R. § 225.4(b)(1) (1978)	4
Fla. Const. art. III, § 3(c)(1)	5
Fla. Stat. ch. 48	30
Fla. Stat. § 659.141(1) (1977)	*passim*

	Page
Fla. Stat. § 659.141(1) (1972 Supp.)	4,5
Fla. Stat. § 660.10 (1977)	*passim*
1973 Fla. Laws 1	5
1973 Fla. Laws Ch. 72-726	5
Other Authorities:	
Chase, *The Emerging Financial Conglomerate: Liberalization of the Bank Holding Company Act*, 60 Geo. L.J. 1225 (1972)	49
Roche, *Entrepreneurial Liberty and the Commerce Power: Expansion, Contraction and Casuistry in the Age of Enterprise*, 30 U. Chi. L. Rev. 680, 702-03 (1963)	28
Stern, *The Commerce Clause and the National Economy, 1933-1946 (pt. 2)*, 59 Harv. L. Rev. 883, 888-93 (1946)	28
Legis. Note, *The Bank Holding Company Act Amendments of 1970*, 39 Geo. Wash. L. Rev. 1200 (1971)	49
Comment, *Implementation of the Bank Holding Company Act Amendments of 1970: The Scope of Banking Activities*, 71 Mich. L. Rev. 1970 (1973)	49
116 Cong. Rec. H11, 786-96 (daily ed. Dec. 16, 1970)	48,49
116 Cong. Rec. S20, 638-49 (daily ed. Dec. 18, 1970)	47,48
S.Rep. No. 1095, pt. 2, 84th Cong., 2d Sess. 5 (1956)	45
S.Rep. No. 1084, 91st Cong. 2d Sess. 24, *reprinted in* [1970] U.S. Code Cong. & Ad. News 5519, 5541	41

	Page
Conference Report No. 91-7147, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. Code Cong. & Ad News 5561 *et. seq.*	39,47
Order Denying Proposal to Act as an Investment Adviser, 59 Fed. Res. Bull. 364 (1973)	5,6,7
Rule 33 of the Rules of the Supreme Court of the United States	51

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No. 79-45

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Appellant,

vs

BT INVESTMENT MANAGERS, INC. and BANKERS TRUST NEW YORK CORPORATION,

Appellees,

ON APPEAL FROM THE UNITED STATES THREE-JUDGE DISTRICT COURT, NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION

BRIEF FOR THE APPELLEES

OPINIONS BELOW

Appellees concur with Appellant's statement of the Opinions Below.

JURISDICTION

Appellees concur with Appellant's statement of the Court's Jurisdiction, subject to their Motion to Affirm.

CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED

1. United States Constitution Article I, § 8, Cl. 3. Congress shall have "power . . . to regulate commerce . . . among the several states . . . ."

2. Florida Statutes § 659.141(1) (1972 Supp.). (The pertinent portion of the statute is set forth in Appendix herein).

3. Florida Statutes § 659.141(1) (1977). (The full text of the statute is set forth in the Brief for the Appellant, Appendix A).

4. Florida Statutes § 660.10 (1977). (The full text of the statute is set forth in the Brief for the Appellant, Appendix B).

5. 12 U.S.C. § 1841(b) and (c) (1976). (The pertinent portion of the statute is set forth in Appendix herein).

6. 12 U.S.C. § 1842 (1976). (The pertinent portion of the statute is set forth in Appendix herein).

7. 12 U.S.C. § 1843(a) and (c)(8) (1976). (The full text of the statute is set forth in the Brief for the Appellant, Appendix D).

8. 12 U.S.C. § 1846 (1976). (The full text of the statute is set forth in the Brief for the Appellant, Appendix E).

9. 12 C.F.R. § 225.4(a)(4) and (5) (1978). (The full text of the Regulations is set forth in the Brief for the Appellant, Appendix F).

10. 12 C.F.R. § 225.4(b)(1) (1978). (The full text of the Regulation is set forth in Appendix herein).

QUESTIONS PRESENTED

1. Whether the challenged statutes, both individually and in combined effect, overtly discriminate against interstate commerce based solely upon factors of out-of-state origin, and are therefore *per se* unconstitutional.

   A. Whether the challenged portions of the Florida Statutes which exclude out-of-state bank holding companies from performing trust or investment advisory services through Florida subsidiaries violate the Commerce Clause of the United States Constitution.

   B. Whether Section 660.10, Florida Statutes, is, by itself, patently discriminatory against out-of-state corporate fiduciaries, and places an impermissible burden on interstate commerce.

2. Whether the discrimination of Section 659.141(1), Florida Statutes, against interstate commerce is authorized by the Bank Holding Company Act.

STATEMENT OF THE CASE

Appellee BANKERS TRUST NEW YORK CORPORATION (hereinafter "Bankers Trust") is a corporation organized under the laws of the State of New York, and is a "bank holding company" within the meaning of the Bank Holding Company Act, 12 U.S.C. Section 1841 *et seq.*. Appellee BT INVESTMENT MANAGERS, INC. (hereinafter "BT Investment") is a corporation organized and incorporated on November 24, 1972, under the laws of the State of Delaware, and is a wholly-owned subsidiary of Bankers Trust. BT Investment qualified under the laws of the State of Florida to do business in Florida on November 27, 1972.

Section 4(c)(8) of the Bank Holding Company Act, 12 U.S.C. Section 1843(c)(8)(1976), authorizes a bank holding company, with the approval of the Board of Governors of the Federal Reserve System (hereinafter "Board") to acquire the shares of any company the activities of which the Board has determined to be so closely related to banking or managing or controlling banks as to be a proper incident thereto. The Board has provided by regulation that "[p]erforming or carrying on any one or more of the functions or activities that may be performed or carried on by a trust company" and "[a]cting as an investment or financial adviser" are such activities. 12 C.F.R. Sections 225.4(a)(4) and (5)(1978).

On October 3, 1972, Bankers Trust applied to the Board, pursuant to 12 U.S.C. Section 1843(c)(8) and 12 C.F.R. Section 225.4(b)(1)(1978), for authority to operate through its proposed subsidiary, BT Investment, from an office located in Palm Beach, Florida, as an investment and financial adviser. At the time of that application, Section 659.141(1), Florida Statutes (1972 Supp.), generally prohibited any bank, trust company, or holding company, the operations of which are principally conducted outside Florida, from acquiring or retaining all or substantially all of the assets of, or control over, any business organization having a place of business in Florida which furnishes investment advisory services *to trust companies or banks in Florida.* The contemplated activity of BT Investment was not within the prohibition of the statute.

Objections were filed to Appellees' application by both the Comptroller of the State of Florida, Appellant's predecessor in office, and the Florida Bankers Association, hereinafter "FBA", amicus curiae herein.

Coincidentally, while Appellees' application was pending, the Governor of the State of Florida called the Legislature into special session, in order to consider legislation concerning capital punishment and other subjects unrelated

to this litigation.[1] Largely at the urging of Appellant's predecessor and FBA, and in direct response to Appellees' pending application,[2] the Legislature of the State of Florida hurriedly enacted an amendment to Section 659.141(1), Florida Statutes (1972 Supp.)[3] extending its prohibition of the furnishing of investment advisory services so as to preclude Appellees from rendering such services to "any person" rather than, as theretofore, only to Florida trust companies and banks.

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[1]Article III, Section 3(c)(1), of the Constitution of the State of Florida provides that the Governor may convene the Legislature in special session by a proclamation specifying the matters to be considered at that session. Only matters within the purview of that proclamation may be considered, unless introduced by consent of two-thirds of the membership of each house. The proclamation of the Governor for the November, 1972, session is contained at Vol. 1, Laws of Florida, 1973, page 1.

[2]In its Order Denying Proposal to Act as an Investment Adviser, the Board found:

> It is beyond question, and BTNYC and the protestants are in agreement, that the notice that BTNYC published in September, 1972, triggered the action of the Florida Legislature in this case and that the newly-enacted legislation was primarily motivated by the threat of BTNYC's entry into the Florida investment advisory markets and was intended to prevent such entry. Federal Reserve Board Order of April 26, 1973, 59 Fed. Res. Bull. 364, 366 (1973).

[3]House Bill 25-A was admitted for introduction with the consent of two-thirds of the membership of the Florida House of Representatives on November 29, 1972, Journal of the Florida House of Representatives, p. 25 (November 29, 1972); was placed on the House Special Order Calendar on November 30 without having been heard or subjected to substantive analysis by any committee, Journal of the Florida House of Representatives, p. 28 (November 30, 1972); and was passed by the House of Representatives and immediately certified to the Florida Senate that same day, Journal of the Florida House of Representatives, pp. 29-30 (November 30, 1972). The Bill was taken up out of order with the consent of two-thirds of the membership of the Florida Senate and passed on the floor of the Florida Senate that same day, Journal of the Florida Senate, p. 21 (November 30, 1972). It then became Chapter 72-726, Laws of Florida (1973), without the Governor's signature.

On April 26, 1973, the Board issued an order denying Appellees' proposal to act as an investment adviser. The Board's Order states in pertinent part:

> Absent the recent enactment of amendments to Section 659.141 and any evidence indicating that *de novo* entry in this case would have the purpose or effect of foreclosing future competition or would otherwise be contrary to the public interest, it appears likely that the Board would have approved the instant proposal. • • • However, while the instant proposal was pending before the Board, the Florida Statutes were amended to generally prohibit the provision of investment advisory services in Florida by non-Florida-based bank holding companies through control of business organizations having offices in Florida. 59 Fed. Res. Bull. 364, 365 (1973).

Though the Board recognized the Florida Legislature's action as an attempt to prevent out-of-state competition,[4]

[4]Throughout its Order Denying Proposal to Act as an Investment Adviser, the Board reiterated its conclusion that the 1972 amendment to Section 659.141(1) was intended to protect Florida interests from out-of-state competition in general and from Appellees in particular. At page 365 of its Order, the Board noted the Congressional recognition that the *de novo* entry of bank holding companies into a new market would have procompetitive effects. The Board found, however, that the 1972 amendment was intended to preclude Bankers Trust from engaging in this competition. The Board stated:

> There appears to be tacit agreement that the recently enacted legislation was intended to, and does, prohibit the performance of investment advisory services in Florida by non-Florida bank holding companies. *Id.* at 365.

The Board also noted that:

> [T]he legislative history of the legislation evidences a legislative intent to exclude BTNYC from engaging in the provision of investment advisory services in Florida from a Florida office. *Id.* at 366.

Reviewing this order and the findings of the Board in their entirety, the Fifth Circuit Court of Appeals noted in *BT Investment Managers, Inc.*, v. *Lewis*, 559 F.2d 950, 954 n. 13 (5th Cir. 1977):

> Reviewing the circumstances of the enactment of the amendment to *Fla. Stat.* Section 659.141(1), the Federal Reserve Board minced no words in characterizing the Florida legislature's action as a brazen attempt to prevent out-of-state competition.

it nonetheless held that, solely because of the amendment to the act, it was required to disapprove the Appellees' application,[5] and that it did not have the judicial power to rule on Appellees' contention that such an act was unconstitutional.[6]

On November 13, 1973, Bankers Trust petitioned the United States Court of Appeals for the Second Circuit for review of the Order of the Federal Reserve Board denying its proposal to act as an investment adviser. That petition has been withdrawn with leave of the court to reinstate at the option of petitioner, pending the outcome of the instant litigation.

This action was commenced on October 24, 1973, to secure a judicial declaration and injunction restraining enforcement of Sections 659.141(1) and 660.10, Florida Statutes. Shortly after commencement of the action, Appellant moved to dismiss based on the "abstention" doctrine arguing, *inter alia,* that the federal court should abstain from ruling on the constitutionality of these statutes until their possible application to Appellees had been determined by the courts of Florida. Though this motion

[5]The Board stated:

> In brief, since the Board is of the opinion that the proposal is prohibited by State law it believes that, under the doctrine set forth by the U.S. Supreme Court in *Whitney*, it must deny the proposal. *Id.* at 366.

[6]The Board stated:

> The Board is not sympathetic with BTNYC when that holding company questions "the fairness and legality of a procedure whereby the proponents of this legislation could prevent [its] proposal from becoming effective by filing objections with the Board and requesting a hearing and then, after hasty enactment of legislation, argue that this very legislation should be the basis for the Board to bar approval of [its] proposal." *Id.* at 366.

However, the Board had previously noted:

> BTNYC's challenge to the constitutionality of any provision of the recently-enacted Florida legislation is properly cognizable only by the judiciary. *Id.* at 366.

was granted by the three-judge court, the Fifth Circuit Court of Appeals noted that this contention was, "in view of appellees' role in blocking approval of appellant's application . . . frankly speaking, incredible," and reversed and remanded so that the three-judge court could pass on the constitutionality of the statutes. *BT Investment Managers, Inc.* v. *Lewis,* 559 F.2d 950, 954 n. 13 (5th Cir. 1977). The court stated:

> Indeed, by their very terms the challenged statutes could scarcely be clearer in effect, if not in purpose—that is, to rid Florida banking and trust interests of non-Florida competition in the area of investment counseling. *Id.* at 954 (footnote omitted).

It was stipulated by the parties at trial below that, but for the existence of the challenged statutes, Bankers Trust would have applied to the Board for authority to engage, through a subsidiary, in the activity of performing or carrying on at a place of business in Florida one or more of the activities or functions that may be performed or carried on by a trust company in a manner authorized by Florida law, but without the power to accept demand deposits or make commercial loans, and would have organized such a trust company under the laws of the United States or the State of Florida.[7] After extensive briefing and argument on the merits, the three-judge court held that Section 660.10 and the first sentence of Section 659.141(1) were patently discriminatory against out-of-state concerns and that the record conclusively indicated that the legislation was *per se* unconstitutional as contemplated by this Court in the recent case of *Philadelphia* v. *New Jersey,* 437 U.S. 617 (1978). In the instant case the three-judge court stated:

> The record here, though sparse, is sufficient to indicate conclusively the discriminatory nature of the statutes under attack. By its terms, Section 659.141(1) erects an insuperable barrier to the entry of foreign-based bank holding companies, through their subsidiaries, into the Florida investment advisory market. Section 660.10 similarly cordons off Florida trust companies from competition by out-of-state concerns. Thus, according to *Philadelphia* v. *New Jersey, supra,* this parochial legislation must be deemed *per se* unconstitutional. 461 F. Supp. at 1196.

[7]Stipulation filed May 11, 1978 at pp. 2-3, Appendix at pp. 23-24 (hereinafter referred to as "Stipulation").

It is from this order that the Comptroller of the State of Florida has appealed.

SUMMARY OF ARGUMENT

I. The Challenged Statutes, Both Individually and in Combined Effect, Overtly Discriminate Against Interstate Commerce Based Solely Upon Factors of Out-of-State Origin, and are Therefore Per Se Unconstitutional.

A. The challenged portions of the Florida Statutes which exclude out-of-state bank holding companies from performing trust or investment advisory services through Florida subsidiaries violate the Commerce Clause of the United States Constitution.

The constitutional principles underlying the three-judge court's decision as to both of the challenged statutes are reiterated in this Court's recent opinion in *Philadelphia* v. *New Jersey,* 437 U.S. 617 (1978). As affirmed therein, the aim of the Commerce Clause is to preserve a truly national economy, and no state may place itself in a position of economic isolation. This Court has historically been vigilant to the evils of economic isolation and protectionism, and in *Philadelphia* declared that "where simple economic protectionism is effected by state legislation, a virtually

per se rule of invalidity has been erected. The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders." 437 U.S. at 624 (citations omitted).

Every impartial forum that has reviewed Section 659.141(1), Florida Statutes (1977) and was familiar with the history of its enactment has correctly concluded that it is a blatant form of overt economic isolationism, both by intent and in effect. Appellant and amici curiae virtually admit this intended discrimination in their respective briefs.

Like the statute stricken in *Philadelphia,* the present statutes are basically protectionist measures, accomplishing a discrimination against interstate commerce based purely on state of origin. No legitimate state interest has been advanced, either in evidence or by logical argument, and this vacuum is not filled by vague references to the spectre of economic concentration nor the argued need for enhanced regulation. The challenged statutes aggravate rather than remedy the suggested but unproven problem of economic concentration by facilitating the growth of local bank holding companies in a competition-free market. Appellee BT Investment has fully qualified to do business in Florida, and it has been stipulated of record that both Appellees are fully subject to the regulatory arm of the state.

Appellant and amici curiae improvidently rely on *Exxon Corporation* v. *Governor of Maryland,* 437 U.S. 117 (1978). In fact, a proper reading of that decision supports the holding of the trial court, and establishes the unconstitutionality of the challenged statutes in that (1) they are not directed at a specific evil, (2) they do not apply evenhandedly to all business organizations flawed by that evil, and (3) the differing impact on out-of-state concerns by the challenged statutes is clearly their intended and principal effect, and

not merely incidental to an otherwise valid regulation. Because the principal effect of the challenged statutes is to protect local concerns from competition with out-of-state companies, they are *per se* unconstitutional, *Philadelphia* v. *New Jersey, supra,* and the "balancing approach" applied by this Court in *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137 (1970) is not reached. Even if the *Pike* test were applied to the challenged statutes, it is clear that their absolute prohibition significantly burdens interstate commerce and, as noted above, they are devoid of any counter-balancing legitimate local purpose.

B. Section 660.10, Florida Statutes is, by itself, Patently Discriminatory against Out-of-State Corporate Fiduciaries, and Places an Impermissible Burden on Interstate Commerce.

The court below found that the challenged statute, on its face, "cordons off Florida trust companies from competition by out-of-state concerns", 461 F. Supp. at 1196, and accordingly is subject to a "virtually per se rule of invalidity." *Philadelphia* v. *New Jersey, supra.* Appellant suggests that the requirements of Section 660.10, Florida Statutes, are neutral in their effect on business, both within and without Florida, while inconsistently admitting that the statute would require Appellees to establish a Florida subsidiary corporation and obtain a Florida trust charter, which he strenuously argues would be violative of both state and national law. Again, *Exxon Corporation* v. *Governor of Maryland, supra,* is cited by Appellant in support of this inconsistent position. As noted above, however, the rationale of that opinion would condemn a statute such as Section 660.10 which establishes differing treatment for entities not based upon a legitimate state interest, but rather solely upon their place of incorporation. Each of the other authorities cited by Appellant in support of this position specifically applies only to regulation against *intrastate*

commerce, and their applicability to "Commerce Clause" litigation defies understanding.

It is clear that Section 660.10, Florida Statutes, not only runs afoul of the *Philadelphia* "virtually per se rule of invalidity", but also fails to satisfy the "balancing test" of constitutionality formulated by the Court in *Pike*. Nor may the statute be supported as furthering the state's legitimate interest in regulating the activities of trust companies, in light of Appellant's stipulation recognizing the state's otherwise sufficiently broad regulatory powers. *See also Fain* v. *Hall,* 463 F. Supp. 661 (M.D. Fla. 1979).

II. The Admitted Discrimination of Section 659.141(1), Florida Statutes, Against Interstate Commerce is Clearly Not Authorized by the Bank Holding Company Act.

Apparently recognizing the weakness of his constitutional arguments, Appellant has shifted the major emphasis in his Brief to the proposition that such admittedly discriminatory statutes have been sanctioned by Congress through the Bank Holding Company Act. A proper analysis of the Act itself leads to a clearly contrary conclusion.

Section 3(d) of the Act provides a Congressional prohibition on acquisition of "banks" across state lines, but by its terms and by the statutorily prescribed definition of "bank", this section clearly does not apply to "companies other than banks." Where the words of a statute are clear, there is no occasion to "construe" those words and the statute will be given its plain and ordinary meaning. *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 201 (1976). The Act by its terms provides separate regulatory schemes regarding the acquisition of "banks" (12 U.S.C. Section 1842) and "companies" other than banks (12 U.S.C. Section 1843). Nothing in the provisions regarding the acquisition

of companies other than banks restricts their acquisition by holding companies to any geographical limits such as state boundaries.

The differing treatment of the Act afforded to acquisitions of "banks" and acquisitions of "any company not a bank" is entirely consistent with the intent of Congress as gleaned from the legislative history surrounding both the original enactment of the Act and its subsequent amendments. It is indisputable that Congress intended to regulate the concentration of commercial banking resources so as to avoid abuses related to the concentration and control of commercial credit, while at the same time facilitating and encouraging the development of bank holding companies into other areas related to banking but not presenting the same potential for abuse. The many inconsistent and unsupported arguments presented by Appellant and amici curiae in their attempts to misconstrue and extend the provisions of Section 3(d) of the Act do not support their request to this Court that it expand the clear limitations enacted by Congress.

It is undisputed that the Act provides a separate regulatory scheme by which bank holding companies may acquire interests in companies other than banks. The Douglas Amendment, by its clear terms, defined within the Act, does not apply to such acquisitions. The Douglas Amendment does not, as Appellant suggests, provide a Congressional authorization to the states to discriminate against interstate commerce, but rather clearly establishes a Congressionally imposed prohibition. Although states are permitted by the Act to exempt themselves from this Congressionally imposed prohibition, nowhere is there an authorization to the states to enact their own prohibition or to expand that provided by Congress. Thus the constitutional infirmity of the challenged statutes is not remedied by recourse to the Bank Holding Company Act.

ARGUMENT

I. The Challenged Statutes, Both Individually and in Combined Effect, Overtly Discriminate Against Interstate Commerce Based Solely Upon Factors of Out-of-State Origin, and are Therefore Per Se *Unconstitutional.*

A. The challenged portions of the Florida Statutes which exclude out-of-state bank holding companies from performing trust or investment advisory services through Florida subsidiaries violate the Commerce Clause of the United States Constitution.

The constitutional principles underlying the three-judge court's decision as to both of the challenged statutes are reiterated in this Court's recent opinion in *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978) which was rendered shortly before the decison below. That case was the subject of separate supplemental briefs by each of the parties, and was analyzed in detail by the three-judge court.

In striking down the discriminatory legislation in *Philadelphia*, this Court recalled the axiom that it is the aim of the Commerce Clause to preserve a truly national economy. Quoting from *H. P. Hood and Sons, Inc.* v. *DuMond*, 336 U.S. 525, 537-38 (1948), the Court stated:

> This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in *Baldwin* v. *Seelig*, 294 U.S. 511, 527, "what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation." 437 U.S. at 623.

In *Philadelphia*, 437 U.S. at 623-24, the Court traced its historical vigilance to the evils of "economic isolation

and protectionism" while at the same time recognizing that "incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people." The Court noted at page 624 that "where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected," and found that "[t]he clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders."

Application of these long-standing principles to the challenged statute is so clear as to foreclose further debate. Every impartial forum that has reviewed Section 659.141(1), Florida Statutes (1977), and which was familiar with the history of its enactment, has concluded that it is a blatant form of overt economic isolationism.[8]

Inconsistently, Appellant and amici curiae FBA and Conference of State Bank Supervisors (hereinafter "State Supervisors") would suggest to this Court that Section 659.141(1) is not discriminatory, while at the same time arguing that it was *intended to be discriminatory* pursuant to a (wrongly perceived) Congressional authorization to burden interstate commerce.

At page 48 of his Brief, Appellant admits that Section 659.141(1), in conjunction with Section 660.10, does "cordon off Florida trust companies from competition by out-of-state concerns." As noted by this Court in *Philadelphia*,

> [t]he crucial inquiry . . . must be directed to determining whether [the statute under scrutiny] is basically a protentionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects

[8] In regard to the findings of the Board and the Fifth Circuit Court of Appeals, see n. 4, *supra*. The three-judge court reached an identical conclusion at 461 F. Supp. 1196, quoted herein at pp. 8-9, *supra*.

upon interstate commerce that are only incidental. *Id.* at 624.

Further, the Court stated that "whatever [the state's] ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, *apart from their origin*, to treat them differently." *Id.* at 626-27 (emphasis added).

Both on its face and in plain effect, Section 659.141(1) violates this constitutional principle of non-discrimination. In truth, the discrimination against Appellees based purely on origin fairly leaps from the face of the statute. Section 659.141(1) does *not* purport to generally prohibit the providing of investment advisory or trust services, nor does it evenhandedly provide a common scheme of regulation or prohibition as to the rendering of such services by all bank holding companies or their subsidiaries. Instead, it blatantly and by its clear terms provides that only those bank holding companies *whose operations are principally conducted outside of Florida* are precluded from controlling business organizations having a place of business in the state of Florida from which they furnish investment advisory services in that state.[9]

In *Philadelphia*, the purported evil sought to be regulated by the state statute was the accumulation of waste. Assuming the validity of New Jersey's evidence that the problem was a real one, this Court nonetheless very properly held that it was impermissible for the statute to specifically impose

[9]Barely three pages after positing that the statute is not discriminatory, Appellant again admits this discriminatory intent. In returning to his argument that such discrimination is authorized by the Bank Holding Company Act, Appellant states at page 59 of his Brief:

> The *principle* [*sic*] *effect* of Section 659.141(1) and Section 660.10, to the extent that it complements Section 659.141(1), is to limit the expansion *of foreign based* bank holding companies into banking and "closely related" activities. (Emphasis added).

only on *out-of-state interests* the full burden of solving the problem.

> The New Jersey law at issue in this case falls squarely within the area that the Commerce Clause puts off limits to state regulation. On its face, it imposes on out-of-state commercial interests the full burden of conserving the State's remaining landfill space. . . . [T]he State has overtly moved to slow or freeze the flow of commerce for protectionist reasons. . . . What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade. 437 U.S. at 628.

Neither the Appellant nor FBA urged at trial below any specific problem that could even purportedly serve as a legitimate basis for the statutes.[10] Appellant and amici curiae now seek to legitimize the statutes by vague references to problems of economic concentration and state regulation. Neither the spectre of economic concentration nor the argued need for enhanced regulatory control possibly apply to save this statute.

Even assuming the unproven legitimacy of the fear of undue economic concentration as a result of bank holding companies expanding their trust and investment advisory activities, Section 659.141(1) is not aimed at solving that

[10]Throughout their briefs, Appellant and amici curiae urge that the current regulation ought to be upheld because it involves an *area* of traditional state concern. Appellees readily admit that banking is an area of traditional state concern, and that the states retain their full police power in that area to legislate for all aspects of the public health, safety and welfare. However, this police power can be invoked in a Commerce Clause context only where the legislation is rationally related to achieving a *specific state purpose* within an area of concern and the burden on interstate commerce is unsubstantial or incidental. As recently stated by this Court in *Hughes* v. *Oklahoma*, _____ U.S. _____, 47 U.S.L.W. 4447, 4451 (1979), the relevant inquiry as to this phase of the Commerce Clause analysis is "whether the statute *serves a legitimate local purpose.*" *Philadelphia, supra*, clarifies that even if legislation attempts to address the state problem, it cannot discriminatorily cast the full burden of solving that problem on out-of-state concerns.

problem.[11] And even if it were, the ruling of this Court in *Philadelphia* establishes that Florida cannot cast the full burden of solving that problem upon out-of-state commercial interests alone.

Neither can Florida justify its total prohibition of all out-of-state competitors on the basis of some presently imagined difficulty of adequately controlling them, when, for example, Appellee BT Investment has fully qualified to do business in Florida, and the chief constitutional officer with primary authority for regulating financial institutions (the Appellant) has stipulated in this very proceeding that both Appellees are amenable to process from Florida courts and are ready, willing and able to comply with all statutory, regulatory or supervisory provisions governing the conduct of their proposed business activities in Florida. Stipulation at 2-3.[12]

[11]Even if the existence of such a problem is assumed, these statutes are not directed at solving it. The centralization and accumulation of economic influence is in no way precluded by these statutes but is merely reserved for the Florida bank holding companies to the exclusion of non-Florida competitors. Likewise, the subject statute does not attempt to regulate or control the activities dealt with (investment advisory services or trust activities). Rather, it attempts to differentiate based on the principal place of activity of the corporations that would be performing those activities, all of which corporations would admittedly be subject to state control and regulation. Again, the purpose of the statute is not to insure the state's ability to regulate, but rather to protect and isolate local interests from interstate competitors. Thus, both the purpose and the effect of the subject statutes are exactly opposed to solving the problem suggested by Appellant and State Supervisors. Section 659.141(1) both in purpose and effect actually encourages and facilitates the concentration and accumulation of the financial oligopoly existing in Florida by insulating the oligopoly against the procompetitive effect of Appellees' proposed *de novo* activities.

[12]The argument of State Supervisors at pages 22 and 23 of its Brief that the fostering of locally controlled business is a legitimate state rationale for excluding out-of-state competition serves as further evidence of the discriminatory intent and effect of these statutes.

On the contrary, State Supervisors simply misconstrues those portions of the cited opinions from which it has concluded the existence and extent of such a permissible state interest. For example, in *Great Western United Corp.* v. *Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds*, _____ U.S. _____, 99 S.Ct. 2710, the court did not embrace the sort of absolute prohibition of out-of-state competition which exists in the present case. Rather, it expressly found that a state "corporate takeover" statute which had the effect of protecting incumbent management would be unacceptable if its purpose were "to prevent the removal of local business to other states." *Id.* at 1282. Only then did the court accept the state's argument that its "interest in benevolent management is a legitimate reason for [the state] to regulate the means by which outsiders can change management," *id.* at 1283, but went on to invalidate the takeover statute under the "balancing approach" of *Pike* v. *Bruce Church, Inc., supra*, on the grounds that such local "benefits" were outweighed by the corresponding burdens on interstate commerce, *id.* at 1286. In *Braeburn Securities Corp.* v. *Smith*, 15 Ill. 2d 55, 153 N.E.2d 806 (1958), the state sought to promote its interest in the "[l]ocal autonomy of banks," *id.* at 809, by evenhandedly halting all further acquisitions thereof by holding companies. The state supreme court upheld this measure against federal and state (but *not* Commerce Clause) constitutional attack, as a legitimate response by the state to the (then) recently enacted Bank Holding Company Act of 1956. In contrast, the statutes involved here are *not* an evenhanded prohibition against *all* holding company acquisitions, and do not at all deal with acquisition of "banks," as to which *Congress* imposed the prohibition against holding company interstate acquisition.

In futile attempt to avoid the consequence of a Commerce Clause analysis, State Supervisors urges at page 8 of its Brief that the scrutinized statutes do not affect interstate commerce. The court below, at the outset of its opinion, specifically found that the business activities affected by the challenged statutes constitute interstate commerce. Relying upon the decisions of this Court in *Katzenbach* v. *McClung*, 379 U.S. 294 (1964), *Wickard* v. *Filburn*, 317 U.S. 111 (1942), and *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978), the three-judge district court ruled that:

> The necessary effect on interstate commerce has been demonstrated here even though no direct evidence to prove such an effect has been presented. This conclusion is compelled, first, because of the pervasive range of federal

To say that exclusion of out-of-state competition can be justified by the desire to foster the local economy is to urge the epitome of economic protectionism.

regulation of bank holding companies and their subsidiaries through the powers vested in the federal government under the commerce clause. This extensive regulation must constitutionally be founded upon a nexus between the provision of financial services and commerce between the states. *No party to this case has contended that the connection to interstate commerce of the activities involved here is so insubstantial as to rob Congress of its authority to regulate in this field.* 461 F. Supp. at 1194 (footnotes omitted) (emphasis added).

It is inconsistent for amicus State Supervisors to argue, on the one hand, that Congress has the power under the Commerce Clause to authorize the states to regulate investment advisory and trust services through 12 U.S.C. Sections 1842(d) and 1846 while, on the other hand, claiming that such activities, though concededly "commerce", are not interstate in their nature or effect.[13] It cannot seriously be suggested that such investment advisory services are not within interstate commerce in light of the significant Congressional regulation of this field through the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-1 *et. seq.*. This Act, like other federal laws regulating the marketing of investment securities which preceded it,[14] is necessarily

[13]State Supervisor relies extensively on *United States* v. *Oregon State Medical Society*, 343 U.S. 326 (1952), seeking to analogize the prepaid medical services in issue there to Appellees' proposed trust and investment advisory services, which are markedly distinct in their purpose and effect on interstate commerce. As in *Oregon*, the decision of the court in *Diversified Brokerage Services, Inc.* v. *Greater Des Moines Board of Realtors*, 521 F.2d 1343 (8th Cir. 1975) cited by State Supervisors also turned upon an express finding that the business in question (a local real estate reciprocal listing service) was purely *intrastate* in its character and effect. On the other hand, trust and investment advisory services are, like the sale of insurance contracts considered by the Court in *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533 (1944), but a link in "a chain of events which becomes interstate commerce." *Id.* at 547.

[14]Securities Act of 1933, 15 U.S.C. sec. 77a *et seq.*; Securities Exchange Act of 1934, 15 U.S.C. sec. 78a *et seq.*; Public Utility Holding Company Act of 1935, 15 U.S.C. sec. 79 *et seq.*; Trust Indenture Act of 1939, 15 U.S.C. sec. 77aaa *et seq.*; Investment Company Act of 1940, 15 U.S.C. sec. 80a-1 *et seq.*.

based upon Congressional finding that such activities are interstate in their nature or effect.[15]

As for trust and other fiduciary services, the Comptroller of the Currency is authorized to charter national banking associations whose operations are "to be limited to those of a trust company and activities related thereto"—in effect, national trust companies. 12 U.S.C. Section 27, *as amended by* Financial Institutions Regulatory and Interest Rate Control Act of 1978, Public Law 95-630, Section 1504, 92 Stat. 3641. The exercise by Congress of its legislative prerogative in this area must necessarily invoke the authority of the Commerce Clause. All trust departments and companies so chartered are subject to the continuing scrutiny and regulation of the Board. It is specious to suggest that these activities do not substantially affect interstate commerce.

[15]In its declaration of findings with which it introduced the Investment Advisers Act of 1940, Congress announced that:

> [I]nvestment advisors are of national concern, in that, among other things—
>
> (1) their advice, counsel, publications, writings, analyses and reports are furnished and distributed, and their contracts, subscription agreements, and other arrangements with clients are negotiated and performed, by the use of the mails and means and instrumentalities of interstate commerce;
>
> (2) their advice, counsel, publications, writings, analyses and reports customarily relate to the purchase and sale of securities traded on national securities exchanges and in interstate over-the-counter markets, securities issued by companies engaged in business in interstate commerce, and securities issued by national banks and member banks of the Federal Reserve System; and
>
> (3) the foregoing transactions occur in such volume as substantially to affect interstate commerce, national securities exchanges, and other securities markets, the national banking system and the national economy. 15 U.S.C. Section 80b-1.

Appellant and amici curiae rely heavily on *Exxon Corporation* v. *Governor of Maryland*, 437 U.S. 117 (1978). In fact, a proper reading of that decision only further establishes the unconstitutionality of these statutes in that (1) it noted the evenhandedness of the statute itself, and the absence of the discriminatory features which are apparent from the face of Section 659.141(1); (2) unlike Section 659.141(1), the regulation enacted by the statute examined in *Exxon* was directed at a specific evil and evenhandedly applied to *all* business organizations which were flawed by that evil; and (3) the differing impact on out-of-state concerns was merely incidental to this otherwise valid regulation rather than the very purpose for its enactment.

Obviously, that statute was not on its face discriminatory as it would have been had it applied only to those corporations "the operations of which are principally conducted outside the state." This very distinction was considered sufficiently significant by the Court in *Exxon* to merit specific reference. The Court stated:

> In fact, the Act creates no barriers whatsoever against interstate independent dealers; it does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market. *The absence* of any of these factors fully distinguishes this case from those in which a State has been found to have discriminated against interstate commerce. *Id.* at 126 (emphasis added).

It was only after noting the absence of these patently discriminatory factors that the Court in *Exxon* undertook to analyze whether or not the differing impact on out-of-

state concerns was merely incidental, or constituted an *impermissible* burden on interstate commerce. Even if this analysis is reached, in contrast to the *Exxon* statute, the present ones do not legislate generally and evenhandedly against a specified form of business organization to remedy a specific evil attendant to that organization. They instead discriminate between organizations of *identical* structure based solely on geographic origin.[16]

Surprisingly, State Supervisors has raised the case of *Hughes* v. *Oklahoma*, ——— U.S. ———, 99 S.Ct. 1727 (1979), for the proposition that "facial discrimination [does] not *require per se* treatment." Brief on Behalf of the Conference of State Bank Supervisors as Amicus Curiae at 15. In the instant case, any debate as to whether or not a discriminatory intent that is "merely facial" requires *per se* treatment is irrelevant in light of the clear reality and Appellant's own admission that "[t]he *principle* [*sic*] *effect* of Section 659.141(1) . . . is to limit the expansion of *foreign based* bank holding companies." Brief for the Appellant at 59 (emphasis added). Where both the language employed and the admitted principal effect of legislation is to cast its full burden on interstate commerce, it is ludicrous to suggest that the statute is not rank economic protectionism and thus

[16]Similarly, Appellant has raised at Page 49 of his Brief the case of *Detroit Automotive Purchasing, Inc.* v. *Lee*, 463 F. Supp. 954 (D. Md. 1978) as a case in which a comprehensive system of licensing was held valid in spite of its impact on interstate commerce because that statute "did not discriminate against any particular segment of commerce, but rather against a particular way of doing business." *Id.* at 49 n. 47. Discussing this case in relation to Section 660.10, Appellant asserts that "if it discriminates at all, it only discriminates against a particular way of doing trust business." As discussed in this Brief, *infra*, the above distinction has no merit even vis-a-vis Section 660.10. However, in the context of Section 659.141(1), it should be observed that the statute upheld in *Detroit Automotive* stands in marked contrast to the one scrutinized here, in that Section 659.141(1) is obviously *not* aimed at bank holding companies in general, but at *foreign* bank holding companies only. Thus this statute can in no way be characterized as being directed at "a particular way of doing business."

per se unconstitutional. This is exemplified in *Philadelphia,* and is consistent with both *Hughes* and *Pike* v. *Bruce Church, Inc., supra.*

At page 20 of its Brief, amicus State Supervisors urges that the balancing test of *Pike* ought to have been applied by the court below to confirm the constitutionality of both challenged statutes. Though State Supervisors cites *Pike* generally, it refrains from fully stating the balancing test from that case, which test Section 659.141(1) very clearly fails. Initially, it would be impossible to find that Section 659.141(1) "regulates evenhandedly" when the statute, on its face and in its clear and admitted effect, discriminates against otherwise identical objects of regulation based solely upon in-state and out-of-state considerations. Because of this discrimination on its face and in its principal effect, the statute also fails the "no patent discrimination" test which *Philadelphia* specifies as a prerequisite to the application of *Pike.* 437 U.S. at 624.

Secondly, the statute fails to "effectuate a legitimate local interest." State Supervisors argues correctly that banking is a general *area* in which the states have traditionally been given broad authority to regulate, but nowhere has Appellant or any amicus curiae raised any particular problem within the area of banking that this statute is designed to solve.[17] Neither has anyone advanced any evidence or logical arguments that this statute was designed to enhance the state's *ability* to regulate, and no such argument can be made in good faith in light of the stipulated ability of Appellant to effectively regulate.[18]

As to whether the burden imposed by this statute is "only incidental", any assertion that the statute passes this test is ludicrous in light of the admitted reality that "[t]he

[17]See discussion of the purported problem of economic concentration at pages 17-18 and note 11, *supra.*

[18]See discussion of Appellant's stipulated ability to regulate at page 18, *supra.*

principle [*sic*] effect of Section 659.141(1) is to limit the expansion of *foreign based* bank holding companies." Brief for the Appellant at 59 (emphasis added).

Similarly, Appellant argues that the statute is constitutional because it doesn't discriminate against *all* out-of-state entities, and would allow a non-banking or non-trust out-of-state corporation to open an investment advisory office in Florida. Brief for the Appellant at 56. This attempted diversion from the discriminatory feature of the statute ignores the reality that, among those business entities which are in all other material respects identical, the statute discriminates against some based upon purely in-state/out-of-state considerations.[19]

B. Section 660.10, Florida Statutes is, by itself, Patently Discriminatory against out-of-state Corporate Fiduciaries, and Places and Impermissible Burden on Interstate Commerce.

In holding Section 660.10, Florida Statutes, violative of the Commerce Clause of the United States Constitution, the court below found that this statute, in effect, "cordons off Florida trust companies from competition by out-of-state

[19]Appellant also seems to suggest that discrimination by geographic factor of principal place of business is less onerous than discrimination based upon place of incorporation. The erection of such restrictive trade barriers based on either factor is the nemesis of a single national economic unit, and either form of geographic discrimination promotes economic Balkanization.

The arguments of Appellant and amici curiae also lack consistency. In seeking to uphold Section 660.10, they argue (*see* Brief for the Appellant at 48) that interstate commerce is not burdened because a corporation can avoid the discrimination by incorporating in Florida, yet, when discussing Section 659.141(1) they inconsistently argue that discrimination based on principal place of activity is constitutional because it doesn't discriminate on the basis of origin of ownership. By this game of musical arguments, they would have this Court believe that discrimination based upon origin of incorporation and based on principal place of activity are both permissible simply because each form of geographic discrimination is not based on the other.

concerns." 461 F. Supp. at 1196. Applying the longstanding principle that such "economic isolation" is subject to a "virtually per se rule of invalidity," the Court need look no further in affirming the ruling below. *Philadelphia* v. *New Jersey*, 437 U.S. at 624.

Appellant suggests, inconsistently, that the requirements of Section 660.10, Florida Statutes, are "neutral in their effect on business, both within and without Florida" while admitting that the statute "requires an out-of-state entity to establish a Florida subsidiary corporation and obtain a Florida trust charter, if it wants to engage in trust activities in Florida." Brief for the Appellant at 48. This burden, it is reasoned, is sustainable on the grounds that it "is directed not to the flow of trust services into and out of Florida, but at the control of facilities within Florida that perform trust services." *Id.* at 50.

In support of this argument, Appellant seeks to analogize this statute to those which were upheld against similar attacks in *Exxon Corporation* v. *Governor of Maryland, supra*, and *Detroit Automotive Purchasing Services, Inc.* v. *Lee*. 462 F. Supp. 954 (D. Md. 1978). Brief for the Appellant at 48-49. As discussed *supra*, a complete reading of this Court's decision in *Exxon* would lead one to the inescapable conclusion that Section 660.10 is constitutionally invalid because it distinguishes those corporate fiduciaries which may qualify to perform trust functions within Florida not upon some rational basis reasonably related to a legitimate state interest, but solely upon their place of incorporation. Citing the *Detroit Automotive* decision, Appellant overlooks the important distinction that the Maryland statute in issue there merely imposed a reasonable licensing scheme which, as a prerequisite to the sale of automobiles within the state of Maryland, prevented an unlicensed out-of-state corporation from transacting its business therein. No attempt was made by Maryland to deny such a license solely on the basis

of the corporation's foreign charter. Nor, in this case, do Appellees deny the right of the state of Florida to reasonably license and evenhandedly regulate those corporations, if any, which are to perform trust functions within its borders.

The decision of this Court in *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168 (1869), cited by Appellant and amici State Supervisors and FBA for the general proposition that a state may exclude a foreign corporation from doing business within its borders,[20] turned upon the express finding of the Court that the business in question, insurance, was "not a transaction of commerce" or, at best, consisted of "local transactions, . . . governed by the local law." *Id.* at 183. Disregarding this Court's subsequent ruling to the contrary on the issue of insurance as interstate commerce in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), it is clear that the above-stated principle of the *Paul* decision should be limited to those instances where the Court finds the business at issue purely local or intrastate.

Similarly, Appellant relies on the 1931 decision of this Court in *Railway Express Agency* v. *Virginia*, 282 U.S. 400, for the proposition that a state may require a foreign corporation to obtain a corporate charter from that state in order to transact local business therein. Brief for the Appellant at 51-52. But as in *Paul, supra*, the Court's decision in *Railway Express* was based upon a initial finding that the business sought to be transacted within the State of Virginia was purely local or intrastate. Such a result is not surprising, given the reported facts of that case and the restrictive construction applied to the term "interstate commerce" by the Court at that point in our nation's

[20]Brief for the Appellant at 23 n. 12; Brief on Behalf of the Conference of State Bank Supervisors as Amicus Curiae at 23-24; Brief in support of the Appellant of Florida Bankers Association as Amicus Curiae at 17-18.

history.[21] On the other hand, the business sought to be transacted by Appellees in the instant case is so substantially interstate in nature and effect as to require "constitutional scrutiny" of the state's efforts to so regulate it. 461 F. Supp. at 1194 n. 9, citing *Philadelphia* v. *New Jersey, supra.*[22]

In a case more closely analogous to the present one, this Court ruled that a state is not free to impose licensing and other burdensome requirements on a foreign corporation seeking to transact interstate business therein, even though the corporation incidentally undertook some local or intrastate business of the same nature within that state as well. *Crutcher* v. *Kentucky*, 141 U.S. 47 (1891). Speaking for the Court, Mr. Justice Bradley noted that:

> To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject. *Id.* at 57.

It is clear that, even accepting the continued vitality of *Railway Express, supra*, that case did not support a state's ability to exclude a foreign corporation desiring to engage in interstate commerce within its borders.

[21] *See, e.g., Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936). *See generally*, Roche, *Entrepreneurial Liberty and the Commerce Power: Expansion, Contraction and Casuistry in the Age of Enterprise*, 30 U.Chi.L.Rev. 680, 702-03 (1963); Stern, *The Commerce Clause and the National Economy, 1933-1946* (pt. 2), 59 Harv.L. Rev. 883, 888-93 (1946).

[22] As to the interstate nature of the commerce affected by the present statutes, see pages 19 through 21, *supra*.

Earlier this year, Florida's statutory prohibition of non-resident individual personal representatives was invalidated on the grounds that it arbitrarily and unreasonably restricted the Florida testator's right to choose a personal representative, in violation of the Fourteenth Amendment to the United States Constitution. *Fain* v. *Hall*, 463 F. Supp. 661 (M.D. Fla. 1979). In so holding, the district court weighed the asserted state interest in the timely and honest administration of Florida estates against the resulting restriction of individual choice, and found the statute lacking. Of particular note were the court's determinations that the non-resident individual personal representative of a Florida estate would be amenable to service of process of Florida courts, could be required to post a suitable bond for the protection of the estate, its creditors and beneficiaries, and otherwise would be subject to the same criteria for appointment and grounds for removal as those individual personal representatives who are residents of Florida. *Id.* at 664-65.

Even if we were to incorrectly assume that Section 660.10, Florida Statutes is *not* so clearly protectionist on its face that it runs afoul of the *Philadelphia* "virtually per se rule of invalidity", it still fails to satisfy the "balancing" test of constitutionality formulated by this Court. *Pike* v. *Bruce Church, Inc., supra; Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366 (1976). The statute does not apply evenhandedly to foreign and domestic trust companies, presents an absolute barrier to performing trust business in Florida by out-of-state concerns[23] and serves no demonstrated state interest.

[23] As discussed at note 19, *supra*, it is blatantly inconsistent to argue that Section 660.10 is constitutionally permissible because it discriminates based only on place of incorporation, and at the same time argue that Section 659.141(1) is permissible because it avoids discrimination based on this factor. Appellant's attempt to reconcile Section 660.10 with the dictates of the Commerce Clause by suggesting that incorporating a Florida subsidiary represents a slight burden flies directly in the face of his previous argument that the Douglas Amendment to the Bank Holding Company Act forbids the acquisition of such subsidiaries.

Appellant and amici curiae refer to the "important regulatory concern" of the state in this area "traditionally left to the control and regulation of the states", and amici cite the fact that Florida is not alone in attempting to so regulate the fiduciary powers of foreign corporations. Brief for the Appellant at 51; Brief on Behalf of the Conference of State Bank Supervisors as Amicus Curiae at 24-28; Brief in Support of Appellant of Florida Bankers Association as Amicus Curiae at 17. Yet, nowhere in their briefs do Appellant or these amici set about to list or explain the interests which the State of Florida undertakes to protect or the purpose to be promoted[24] through Section 660.10. Nor has there been any apparent attempt to consider those interests in the light of the burden placed in their behalf on interstate commerce, or to determine whether those interests "could be promoted as well with a lesser impact on interstate commerce." *Pike, supra,* at 142. Appellees do not deny the existence of strong

[24]As discussed in note 10 *supra*, the simple cry that the statute falls within an *area* of state concern obfuscates the required inquiry as to whether the statute is directed at solving a particular problem or promoting a specific purpose within that area. Any assertion that Section 660.10 is a "regulatory technique" designed to enhance the regulatory ability of the state is a sham in light of (1) the stipulation by Appellant that Appellee Bankers Trust "is ready, willing, and able to comply with all lawful statutory, regulatory or supervisory provisions governing the conduct of the trust business in Florida," Stipulation at page 2; (2) the stipulation that the purpose of the proposed trust subsidiary is merely to carry out "one or more of the functions or activities that may be performed or carried on by a trust company in the manner authorized by Florida law," Stipulation at page 2; (3) Florida Statutes fully subjecting such a subsidiary to jurisdiction and process of Florida courts, *see* Chapter 48, Florida Statutes; and (4) local decisions finding that Florida courts possess all the necessary tools to promote the State's interest in assuring that foreign fiduciaries adhere to Florida's policies regarding honest and efficient estate administration. *Fain* v. *Hall, supra.*

Appellant did not introduce any evidence whatsoever as to a deficiency in the state's ability to regulate Florida activities of trust companies incorporated in other states, and the present assertion of such a problem is purely speculative and contrary to the above stipulation, jurisdictional statutes, and court decisions.

state interests in the area of trust services, nor the right of the state to reasonably and evenhandedly regulate them for the public good. Yet, as the court in *Fain* v. *Hall, supra,* recently found when performing a similar balancing test, these legitimate state interests can be served as well by existing measures of control short of an absolute prohibition of nonresident fiduciaries. The applicability of such existing regulatory measures to Appellees has been stipulated of record and is not in issue herein.

II. The Admitted Discrimination of Section 659.141(1), Florida Statutes, Against Interstate Commerce is Clearly Not Authorized by the Bank Holding Company Act.

In an attempt to avoid the obvious constitutional infirmity of Section 659.141(1), Appellant urges that, by enactment of 12 U.S.C. Section 1842(d), Congress has authorized the states to discriminate against foreign bank holding companies in their attempted acquisitions not only of "banks" but also of companies engaged in activities "closely related to banking". Inasmuch as this construction does not appear from (and is in fact contrary to) the language of the Bank Holding Company Act, Appellant argues that such an authorization must be "implied" from his perception of the legislative intent and history of that Act. In fact, a proper reading of both the words employed and the legislative history of the Bank Holding Company Act verifies that no such authority has been granted or implied therein.

The Bank Holding Company Act provides in pertinent part that the Board shall not approve any application by a bank holding company or subsidiary thereof to acquire any interest in

> any additional *bank* located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on the effective date of this amendment . . . unless the acquisition . . . is specifically authorized by the statute laws of the State

in which such bank is located. 12 U.S.C. Section 1842(d) (1976) (emphasis added).

Congress has by this provision affirmatively barred out-of-state bank holding company acquisitions of "banks" unless specifically authorized by the states. Nowhere in the Act are the states authorized to expand that Congressional prohibition to discriminate as to acquisitions of "companies other than banks."

It is well settled as a matter of statutory interpretation that where the words of a statute are clear, there is no occasion to "construe" those words and the statute will be given its plain and ordinary meaning. *See, e.g., Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 201 (1976). In this regard, it is difficult to imagine how Congress could have employed any clearer language in this somewhat complex area. The intent is apparent from the language: (1) holding companies may in some circumstances acquire banks (12 U.S.C. Section 1842) and may in some circumstances acquire other companies (12 U.S.C. Section 1843); (2) by 12 U.S.C. Section 1842(d) Congress prohibited the acquisition of "banks" across state lines, unless specifically permitted by state statute; (3) the only authority granted by Congress to the states under 12 U.S.C. Section 1842(d) is this authority to legislate *in favor of* interstate bank acquisitions by bank holding companies rather than *against* interstate commerce generally as Appellant suggests; and (4) nowhere in Sections 1842, 1843 or 1846 is there expressed or implied an authorization for states to discriminate as to other acquisitions. Section 659.141(1), Florida Statutes, is not at all the sort of limited state legislation, exempting Florida from the general Congressional discrimination against interstate bank acquisitions, which 12 U.S.C. Section 1842(d) itself would allow. Thus lacking Congressional authorization, Section 659.141(1) is constitutionally invalid as an admitted attempt by the state of Florida to discriminate (by exclusion)

against interstate commerce in the fields of banking, trust services and investment advice.

The Bank Holding Company Act establishes that bank holding companies have the power to acquire interests in certain companies other than banks. Specifically, 12 U.S.C. Section 1843 fully recognizes and extensively restricts "interests in non-banking organizations", which organizations are clarified to be "any company not a bank." It is therefore obvious the Bank Holding Company Act contemplates that holding companies may in different, specified circumstances acquire interests in both "banks" and "companies not banks," and that Congress has elected to discriminate against out-of-state holding companies only in the acquisition of "banks".

The differing treatment afforded to acquisitions of "banks" and acquisitions of "any company not a bank" has always permeated the Bank Holding Company Act. Though the Act covers *all* acquisitions by bank holding companies, the distinction between acquisitions of "banks" and acquisitions of other "companies" is initially facilitated by the statement of very disparate definitions of those terms. It is evident from those definitions, contained in 12 U.S.C. Section 1841(b) and (c), that the term "company" is defined expansively to encompass practically any perpetually existent business entity.[25] The term "bank" on the other hand, is more explicitly defined in Section 1841(c) to encompass only those entities with specific attributes, primarily the accepting of deposits that may be withdrawn on demand,

[25]The term "company" is presently defined as follows:

(b) 'Company' means any corporation, partnership, business trust, association. or similar organization, or any other trust unless by its terms it must terminate within twenty-five years or not later than twenty-one years and ten months after the death of individuals living on the effective date of the trust, but shall not include any corporation the majority of the shares of which are owned by the United States or by any State. 12 U.S.C. Section 1841.

and engaging in the business activity of making commercial loans.[26]

These definitions facilitate and are used to provide different regulatory treatment as to the circumstances under which a bank holding company may acquire "any additional bank," Section 1842(d), and the circumstances under which a bank holding company may acquire interests in "any company not a bank," Section 1843.[27]

[26]That definition provides:

'Bank' means any institution organized under the laws of the United States, any State of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans. Such term does not include any organization operating under Section 25 or Section 25(a) of the Federal Reserve Act, or any organization which does not do business within the United States except as an incident to its activities outside the United States.

[27]This differing regulatory treatment clearly appears from both the titles and substantive provisions of Section 1842 and Section 1843. The title of Section 1842 is "Acquisition of *bank shares or assets*—prior approval of Board as necessary; exceptions." (Emphasis added). This is contrasted with the title of Section 1843 which reads "Interests in non-banking organization—ownership or control of voting shares of any company not a bank; engagement in business other than that of banking." The Congressional selection of those words cannot be taken lightly and such usage was presumptively determined by resort to the definitions that Congress took pains to include in the statute. Clearly, if Congress had intended Section 1842 to govern the acquisition of both banks and other companies which are not banks, it would have been a simple matter for Congress to have provided in Section 1842, and specifically subsection (d) of that section, that it apply to the acquisition of "any additional company." Instead, Congress provided that such subsection should apply only to the acquisitions of assets of "any additional bank." In contrast, it is Section 1843 which by its own specific terms addresses the circumstances under which bank holding companies may acquire interest in "any company not a bank." Totally absent from that section is any authorization to a state to prohibit or discriminate in such acquisition. As noted by the Third Circuit Court of Appeals in *National State Bank of Elizabeth, N.J.* v. *Smith*, 591 F.2d 223, 227, the regulatory authority with the duty to construe this definition (the Board) has concluded that an entity whose powers are limited to the performance of fiduciary operations would not be a "bank" within this definition.

In an effort to "construe" the plain words of Section 1842(d) in order to raise an "implied" authorization to discriminate against out-of-state holding companies as to acquisitions of "companies other than banks," Appellant and amicus State Supervisors have raised no fewer than six obfuscating and often inconsistent false issues which are disposed of below. They are:

1) Since the intent of the Bank Holding Company Act has always been to limit the concentration of financial power, the present wording of the Act must be broadly construed to prohibit interstate acquisitions of both "banks" and "companies" other than banks. Brief for the Appellant at 26.

2) As originally enacted, Section 1842(d) prohibited and therefore must still prohibit acquisitions of companies other than banks across state lines. Brief for the Appellant at 28.

3) The present narrow definition of "bank" should be ignored because it wasn't in the Bank Holding Company Act at the time of enactment of the Douglas Amendment. Brief on Behalf of the Conference of State Bank Supervisors as Amicus Curiae at 29-30.

4) Section 1842(d) must be construed to apply to "companies" other than banks as well as to "banks" to preserve the competitive equality of the state and national banking systems and to perpetuate the dual system of banking. Brief on Behalf of the Conference of State Bank Supervisors as Amicus Curiae at 30-33.

5) 12 U.S.C. Section 1846 authorizes, recognizes and respects the right of each state to forbid out-of-state holding company acquisitions of companies other than "banks" within their boundaries. Brief for the Appellant at 36-44.

6) The three-judge court generally misconstrued the effect of the 1970 amendments to the Bank Holding

Company Act as a liberalization of that Act and relied upon this construction in striking down the challenged statutes. Brief for the Appellant at 26-27.

These inconsistent and erroneous arguments of Appellant and amicus curiae misperceive the entire issue in characterizing the Bank Holding Company Act as authorizing the states to discriminate against interstate commerce. As discussed *supra*, Section 1842(d) precludes interstate acquisitions of "banks" by out-of-state bank holding companies not by authorizing the states to prohibit those acquisitions, but instead by itself precluding the acquisitions unless the state expressly consents to them.[28] As is apparent throughout the following discussion, Congress could easily and readily have achieved the results Appellant claims were intended simply by using or inserting the word "company" in Section 1842(d) instead of, or along with, the term "bank".

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[28]In the trial proceedings in this litigation, Appellant spent little or no effort characterizing the Bank Holding Company Act as an *authorization to the states* to discriminate. This was so because that argument was not then perceived as being as important as the other arguments relating to the Commerce Clause. In Appellant's present Brief, however, as discussed at page 15 herein, he practically admits that Section 659.141(1) is discriminatory in intent and principal effect, and Appellant and amici curiae direct most of their efforts to false propositions regarding the effect of the Bank Holding Company Act in purportedly allowing that discrimination.

Since several of the false arguments now raised by Appellant and amici curiae are based on the incorrect premise that the *states* have been given broad and unrevoked authority to enact discriminatory legislation, the correction of this false presumption becomes necessary.

False Argument Number 1: The intent of the Bank Holding Company Act requires broad construction of "banks" to include all "companies."

As stated by Appellant at page 37 of his Brief, "Congress recognized that holding companies are not evil of themselves." Excessively generalized cries of "undue concentration of economic power" tend to obliterate the specific types of concentrations that Congress feared and was determined to prevent. Congress did not, as Appellant would have this Court believe, broadly prohibit holding company expansion across state lines or intend generally to retard accumulations of capital that are necessary to the functioning of any capitalistic society. Instead, Congress eschewed such a "shotgun" approach and, through enactment and subsequent amendments of the Bank Holding Company Act, has demonstrated that the evil originally feared was the concentration of *commercial banking resources* and possible abuses related to the *control of commercial credit*.[29]

Indeed, the reason for the narrowing of definitions in 1966 and in 1970 was to confine the Act's regulation of banks to the evil feared and clarify that the word "bank" would encompass only those institutions that accepted demand deposits and made commercial loans, and were thereby in a position to control commercial credit. Obviously, the fear of undue economic concentration through holding company acquisitions of "banks" is not intended to subject acquisitions of "companies other than banks" to the same regulatory treatment reserved for "banks", which are in a position to concentrate and control commercial credit. Thus a generalized claim that the Bank Holding

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[29]See discussion, pp. 40-41, *infra*.

Company Act was intended to prevent undue concentrations of economic power cannot serve as a basis for the drastic expansion of the present Congressional definitions necessary to read the word "bank" in Section 1842(d) as if it really meant "bank or other company."[30]

False Argument Number 2: As originally enacted, Section 1842(d) prohibited and therefore must still prohibit acquisitions of companies other than banks across state lines.

At pages 27 and 28 of his Brief, Appellant argues that the "business of banking" restriction on acquisitions of closely related companies contained in the original Act had and still has the effect of precluding *all* out-of-state acquisitions by holding companies.[31] Thus, Appellant contends that the Douglas Amendment, by prohibiting a holding company from acquiring a *bank* in another state, had the effect of prohibiting acquisitions of closely related companies in other states as well, reasoning that "[i]n fact, there could be no direct and significant connection because there could be no banking subsidiary." Brief for the Appellant at 28. There are several flaws in this imaginative argument, the most obvious of which is that the "business of banking" language which serves as the key to this approach was deleted by the 1970 amendments and therefore could not possibly serve as a present impediment to acquisitions of closely related companies in other states. Even if the words of the 1956 Act or subsequently rejected judicial construc-

[30]As discussed above, the notion that Section 659.141(1) was enacted pursuant to a perceived Congressional authorization for the states to legislate for the prevention of undue concentrations of economic power is also inconsistent with the fact that this section is clearly not directed at such a purpose. *See also* n. 11, *supra*.

[31]Appellant asserts that under the Board's early construction of the original Act no holding company could acquire a subsidiary "whose activities were not 'directly and significantly connected' to the banking operations that the particular holding company was already engaged in." Brief for the Appellant at 28.

tions of that language had the effect of precluding out-of-state acquisitions of closely related companies, such a result arose directly and solely from the *Congressional* prohibition and decisions construing it, and died with the repeal of those words.

The second flaw is that, as Appellant himself notes, the 1970 deletion of the phrase "the business of" from 12 U.S.C. Section 1843 was not intended by Congress to be a departure from the supposed previous Congressional policy of requiring a "direct and significant connection", but was primarily sought by the Board

> *to make it clear* that non-banking activities need not relate to the particular banking business of the applicant, thus permitting activities in areas *geographically removed* from the applicant's bank operations. Conference Report, [1970] U.S. Code Cong. & Ad. News 5566-67 (emphasis added), *quoted in* Brief for the Appellant at 34.

Thus it is clear that even if the Board's "direct and significant connection" holdings had once prevented interstate acquisitions of closely related companies as Appellant contends, the 1970 amendments were intended to reject such a misconstruction and clarify that such a result had *never* been the intent of Congress.

At page 35 of his Brief, Appellant acknowledges that the deletion of the "business of banking" phrase, coupled with the above statement of legislative intent, manifests a Congressional desire to relax any geographic restriction that had been attributed by the Board to those words. However, Appellant then speculates that there is nothing to suggest relaxation of restrictions on expansion across state lines. Appellant's reasoning is both circular and internally inconsistent in that it posits a Congressional intent to enact geographic restrictions based upon the phrase "business of

banking'' (when any such restriction arose purely from the Board's early interpretations of that phrase) and then inconsistently suggests that part of that restriction remained even when Congress repudiated the restriction and deleted the phrase giving rise to it. In fact, the above quote from the Conference Report clarifies beyond dispute that to the extent any geographic restriction was attributed by the Board to the original phrase, that restriction was intended to be *totally* removed by the deletion of the phrase.

> *False Argument Number 3:* The present narrow definition of ''bank'' should be ignored because it wasn't in the Bank Holding Company Act at the time of the Douglas Amendment.

At pages 29 and 30 of its Brief State Supervisors argues that since 12 U.S.C. Section 1842 was originally enacted with reference to a previous, broader definition of the term ''bank'', Section 1842 must presently be construed as if that definition were fixed and immutable, and had not been altered by subsequent Congressional enactments. Thus, in construing the term ''bank'' in Section 1842, State Supervisors would have the Court ignore the Congressional amendments of 1966 and 1970, which culminated in the present definition.

The major flaw in this argument is that amicus State Supervisors offers no reasoning, beyond conjecture, to support its inference that Congress had the original definition of ''bank'' in mind when it drafted the Douglas Amendment, but somehow overlooked the certain effect on the Douglas Amendment when it later altered the definition of the term ''bank''. Indeed, as the Senate Banking and Currency Committee report on the 1970 amendments clearly shows,

> [t]he definition of ''bank'' adopted by Congress in 1966 was designed to include commercial banks and exclude those institutions not engaged in commercial banking, since the purpose of the act was to restrain undue concentration of commercial banking resources and to prevent

> possible abuses related to the control of commercial credit. However, *the Federal Reserve Board has noted that this definition may be too broad and may include institutions which are not in fact engaged in the business of commercial banking in that they do not make commercial loans.* The committee, accordingly, adopted a provision which would *exclude institutions that are not engaged in the business of making commercial loans from the definition of ''bank.''* S.Rep. No. 91-1084, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. Code Cong. & Ad. News 5519, 5541 (emphasis added).

State Supervisors asks this Court to presume that Congress did not know what it was doing, and did not mean what it said, when it amended the definition of ''bank'' in both 1966 and 1970. The change in the definition of ''bank'' effected in 1966 was a portion of Public Law 89-485, 80 Stat. 236 (1966). It is significant to note that that same Congressional act, Public Law 89-485, also contained a comprehensive alteration of the Douglas Amendment itself. Thus, it cannot credibly be contended that Congress was unaware of the Douglas Amendment at the time Public Law 89-485 was enacted.

The simple and irrefutable matter of law is that Section 1842 presently only affects the ability of holding companies to acquire ''banks'' as that term is presently defined in Section 1841, and Section 1843 presently governs the circumstances under which holding companies can acquire ''companies other than banks''.

> *False Argument Number 4:* Preservation of competitive equality in the dual system of banking is in question.

At page 30 of its Brief, State Supervisors argues that the term ''bank'' in Section 1842(d) must be construed to really mean ''company'' in order to preserve the competitive equality between state and national banks.

This argument by State Supervisors attempts to redefine the terms "state" and "national" as applied to banks in the context of competitive equality within the dual banking system. The terms do not relate to a geographic sphere of activity as State Supervisors misuses them, but rather refer to the governmental body chartering the entity. The authorities cited refer only to the intent of Congress to insure equal treatment and equal competitive standing between state chartered banks and banks chartered by the Comptroller of the Currency.

This general statement of Congressional intent, although interesting, has no relevance to the issues presented in the instant proceedings. The ability of a bank holding company to own subsidiary companies in states other than its state of principal activity is totally unrelated to whether its banks are state chartered or nationally chartered. In fact, the principal bank owned by Bankers Trust is Bankers Trust Company, a state bank chartered by the state of New York, whereas several of the smaller bank subsidiaries of Bankers Trust, operating in the state of New York, are nationally chartered.

This argument is also obviously fallacious, even under the authorities cited by State Supervisors, in that those authorities and others, including 12 U.S.C. Section 1846, firmly recognize and preserve the ability of the states to reasonably regulate *all* financial and fiduciary institutions doing business within their borders so long as such regulation is evenhanded and not violative of the federal Constitution. In fact, the requirement that legislation must evenhandedly address in-state and out-of-state financial interests (other than in acquisitions of banks, pursuant to Section 1842(d)) is fully consistent with preserving competitive equality of state and nationally chartered financial institutions.

False Argument Number 5: States are authorized by Section 1846 to forbid acquisition of companies other than "banks".

At page 33 of its Brief, amicus State Supervisors asserts that

> The second provision of the 1956 Bank Holding Company Act that authorizes sections 659.141(1) and 660.10 is section 7, which reads:
>
> > The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof. [12 U.S.C. Section 1846 (1976)]

Obviously, the states reserve a right to be more restrictive regarding the formation or operation of bank holding companies than federal authorities are under the Bank Holding Company Act.[32] Section 659.141(1) is constitutionally flawed not because it is restrictive, but because it is blatantly discriminatory in its restrictions.

Prior to enactment of the Bank Holding Company Act, the states possessed the power to *evenhandedly* regulate such activities, and Section 1846 clarifies that Congress has not preempted that regulatory ability. As stated by amicus State Supervisors at page 34 of its Brief:

> One power the states clearly retain under section 7 [Section 1846] is the power to prohibit the formation of bank holding companies and to exclude all bank holding companies from their boundaries. *See Whitney National*

[32]Though Appellant, State Supervisors and FBA strain to characterize the three-judge court's ruling as precluding the ability of the states to extensively regulate bank holding companies, Appellees have never contended, and the three-judge court did not order, that anything in the Commerce Clause or the Bank Holding Company Act affected the states' preexisting ability to reasonably regulate financial and fiduciary activities within their borders. The district court fully recognized the continuing ability of the states to evenhandedly regulate in these areas.

Bank v. *Bank of New Orleans & Trust Co.* 379 U.S. 411, 419 n. 5; 102 Cong. Rec. 6752 (1956).

Yet, such an evenhanded prohibition as to a particular form of doing business is not what the FBA has sought through the Florida Legislature in Section 659.141(1).[33] The states have *never* had the power to pass such discriminatory legislation, and Section 1846 could not have been and was not intended to "preserve" a previously nonexistent power.

By its clear terms, 12 U.S.C. Section 1846 is not an affirmative grant of authority to burden interstate commerce, but simply states what the Bank Holding Company Act "shall *not* be construed" to mean. (Emphasis added).[34]

[33]Without exception, the cases cited by Appellant at pages 38-44 of his Brief for the proposition that 12 U.S.C. Section 1846 "granted" the states broad powers all involve state legislation which evenhandedly regulated various aspects of banking therein, without distinction based on geographic factors as in the present case. Appellant's attempt to reason therefrom that "[l]esser bans, such as those in the subject Florida Statutes" should *a fortiori* be upheld ignores the fact that it was only the evenhanded, comprehensive application of the laws in those cases which saved them from constitutional challenge in the first place.

[34]*See, e.g., Great Western United Corp.* v. *Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds (venue)*, ——— U.S. ———, 99 S.Ct. 2710 (1979), which held that language similar to 12 U.S.C. Section 1846 was intended only to negate an inference that Congress had generally preempted the securities field from state regulation. In the absence of a specific delegation to regulate commerce, such clauses are mere expressions that the states may continue to exercise pre-existing power, or power "hereafter" acquired, and do not of themselves expand that pre-existing power so as to authorize burdens on interstate commerce.

As quoted from *Great Western* in the opinion of the three-judge court, 461 F. Supp. 1187, 1199:

> When Congress has exempted state laws from Commerce Clause restrictions it has used language specifically directing that certain interstate commerce may be regulated as though it were purely local.

When Section 1846 was originally enacted in 1956, there was concern as to the possibility that it might be construed as an affirmative grant of power to the states, and the Senate committee took special care in its drafting to preclude this result. As stated by Mr. Robinson of the Committee on Banking and Currency:

> A great deal of concern has been expressed that section 7 of the bill as reported by the committee granted new authority and powers to States over national banks in general, and respecting the stocks of national banks in particular. • • •
>
> In order to clarify the legislative history of section 7, the committee wishes to emphasize that this section *does not grant any new authority* to States over national banks. The purpose of this section is to preserve to the States those powers which they *now have* in our dual banking system. S. Rep. No. 1095, Part 2, 84th Cong., 2d Sess. 5 (1956) (emphasis added).

Section 659.141(1) has nothing to do with facilitating or perpetuating a dual and competitively equal system of state-chartered and nationally-chartered banks, and does not fall within the powers the States possessed prior to 1956 and retained by virtue of Section 1846.

Even reading Section 1846 *in pari materia* with Section 1842, it is clear that in neither of those sections has Congress authorized *the states* to affirmatively burden interstate commerce. To the extent the Bank Holding Company Act results in some discrimination against interstate commerce as to acquisitions of "banks", it is a purely *Congressional* dis-

Holding that language similar to Section 1846 was not such a specific delegation of power, the court in *Great Western* stated:

> Rather than allowing violations of the commerce clause, § 28 appears to direct only that federal securities law should not be interpreted as a wholesale displacement of state securities regulation. 577 F.2d at 1281.

crimination, not to be expanded by the states as to other acquisitions.

False Argument Number 6: The three-judge court misconstrued the effect of the 1970 amendments to the Bank Holding Company Act as a liberalization of that Act.

At various portions of their Briefs, Appellant (pages 26-27, 35-36) and amicus FBA (pages 13-14) attempt to convince this Court that the three-judge court erred in regarding the 1970 amendments to the Bank Holding Company Act as a departure from the original purpose of the Act which they argue was to limit the concentration of economic power in the hands of the bank holding companies.

This "red herring" is a clear mischaracterization of the three-judge court's holding. Indeed, before discussing the effect of the 1970 amendments, the court concluded that "defendant and amicus are correct concerning the general intent of the Act (preventing the concentration of financial power by bank holding companies)". 461 F. Supp. at 1200. It is therefore clear that the three-judge court in no way rejected the original intent of the Bank Holding Company Act.

What the three-judge court *did* reject was any contention that the 1966 and 1970 amendments to the Act should be ignored, or that anything in those amendments supported an assertion that trust and investment advisory services were included within the acquisition prohibition contained in Section 1842(d).[35]

[35]The lower court stated at 461 F. Supp. 1200:

> The legislative histories of the Bank Holding Company Act and the 1966 and 1970 amendments to the Act contain nothing to support the conclusion that a state's authority to forbid foreign companies from acquiring banks within that state includes the right also to forbid them from acquiring companies offering services closely related to banking.

Appellant's argument that the 1970 amendments were not a liberalization of the Board's discretion in allowing acquisitions of "closely related companies", simply because the Conference Commitee report retained the "closely related" test as opposed to the "functionally related" test which had been in both the House and Senate Bills, is clearly erroneous, and was joined in by only four of the twelve House/Senate conferees. Three of the House managers declined to sign the Statement of the Managers on the Part of the House, Conference Report No. 91-7147, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. Code Cong. & Ad. News 5561 (hereinafter "House Managers' Statement") relied upon by Appellant, and the inaccuracies of that Statement were pointed out in both the House and Senate floor debates on the Conference Committee bill. In fact, Senator Sparkman spoke on the Senate floor for the specific purpose of assuring that a more accurate view of legislative history would be included in the Congressional Record.[36]

[36]116 Congressional Record S20,638 (daily ed. Dec. 18, 1970). As pointed out by Senator Sparkman, while the conferees were still debating the proposed "functionally related" language, they inquired of the Federal Reserve Board as to the significance of the language, which the Board had originally supported. Letter of November 19, 1970, from Representative Wright Patman to Arthur F. Burns, Chairman, Board of Governors, Federal Reserve Board, printed in 116 Congressional Record S20,639 (daily ed. Dec. 18, 1970). After a meeting of the Board, Chairman Burns responded to the conferees that retaining the "functionally related" language was *not* essential to expanding the Board's discretion, so long as the "business of banking" language previously in the Act was deleted. Speaking of the liberalizing intent of the Board in originally suggesting the "functionally related" language, Chairman Burns stated:

> If the conferees prefer to keep "closely related" in the language of the statute, *our objective would be served* by changing the words "business of banking or of managing or controlling banks" to read "banking or managing or controlling banks."

Letter of November 23, 1970, from Arthur F. Burns to Hon. Wright Patman, printed in 116 Congressional Record S20,639 (daily ed. Dec. 18, 1970) (emphasis added). By deleting the words "business of", the desired liberalization was fully realized without the need to also delete the words "closely related."

Similarly, Senator Bennett, another of the conferees, stated specifically that he did not agree with Representative Patman's interpretation of the Conference Committee Report as expressed by Mr. Patman in the House Managers' Statement and on the floor of the House.[37]

The House floor debate clarifies that a majority of the conferees intended for the 1970 amendments to liberalize the Board's discretion as to acquisition of closely related companies. Though Mr. Patman read most of the House Managers' Statement into the record, 116 Cong. Rec. H11,786-89 (daily ed. Dec. 16, 1970), Mr. Widnall, another of the House conferees, clarified that the House Managers' Statement was in error, *id.* at H11,789-96, and comprehensively rebutted the House Managers' Statement.[38] Representative Widnall's comments were concurred in by both Representative Johnson and Representative Stanton, who had also declined to sign the House Managers' Statement. *Id.* at H11,796.[39]

Based upon the origin of the final language (the Board) and the fact that the liberalizing intent of that language was clearly explained to both the conferees and the full House and Senate prior to voting on the bill, it is obvious and irrefutable that Congress intended to and did broaden the Board's discretion in approving acquisitions of "closely related" companies by its 1970 amendment.

[37]Senator Bennett stated that the amended language of the Act "clearly gives the Federal Reserve Board broader discretion than it now has to make determinations of permissible activities." 116 Congressional Record. S20,645 (daily ed. Dec. 18, 1970). Senator Bennett also pointed out the error of the House Managers' Statement to the effect that deletion of the phrase "financial, fiduciary, or insurance" should not be regarded as expanding the Board's discretion. At pages S20,648-49, he points out:

> This was specifically debated by the committee in executive session and it was decided that this deletion would in no way restrict the flexibility of the Federal Reserve Board *but in fact would increase it,* since some activities which may be in the public benefit, and which may be closely related to banking, may not be financial, fiduciary, or involving insurance. (Emphasis added).

As concluded by Senator Bennett regarding the House Managers' Statement in general:

> I believe, an attempt at this point by four of 12 conferees to use the managers' statement to upset the clear legislative history regarding the terms "closely related" and "functionally related" and the deletion of "financial, fiduciary, or insurance" is very questionable and cannot be considered to represent the understanding or intent of a majority of the conferees. *Id.* at S20,649.

[38]Regarding deletion of the "functionally related" language from the House and Senate bills and the concomitant deletion of the restrictive "business of banking" language, Mr. Widnall noted that one major effect of the Conference Committee report was

> the change of section 4(c)(8) of the 1956 Bank Holding Company Act so as to give the Federal Reserve Board *greater flexibility* in determining what nonbank activities are permissible for bank holding companies and their subsidiaries. *Id.* at H11,789 (emphasis added).

Speaking of the ultimate Conference Committee language, Mr. Widnall stated:

> It should be made clear that the Board recommended this new test and the Board's intent was to introduce a new public interest concept in order to give it the desired flexibility. *Id.* at H11,790.

[39]Reaching a similar conclusion as to the liberalizing effect of the 1970 amendments on non-bank acquisitions, *see National Couriers Association* v. *Board of Governors,* 516 F.2d 1229, 1236-37 (D.C. Cir. 1975); Chase, *The Emerging Financial Conglomerate: Liberalization of the Bank Holding Company Act,* 60 Geo.L.J. 1225 (1972); Comment, *Implementation of the Bank Holding Company Act Amendments of 1970: The Scope of Banking Activities,* 71 Mich.L. Rev. 1970 (1973); Legis. Note, *The Bank Holding Company Act Amendments of 1970,* 39 Geo.Wash L.Rev. 1200 (1971).

CONCLUSION

Sections 659.141(1) and 660.10 are clearly discriminatory against and burdensome upon interstate commerce, and therefore violative of the United States Constitution. The Congress has not authorized or consented to this burden on interstate commerce, and the challenged statutes were properly stricken by the three-judge district court. The Opinion and Order of the three-judge district court are correct and should be affirmed by this Court.

Respectfully submitted,

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DATE: December 17, 1979

Proof of Service

I, Stephen E. Day, one of the attorneys for BT INVESTMENT MANAGERS, INC. and BANKERS TRUST NEW YORK CORPORATION, Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of December, 1979, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Brief for the Appellees on the several parties thereto, as follows:

1. On Gerald A. Lewis, Comptroller of the State of Florida and Commissioner of Banking of the State of Florida, Appellant, by mailing three copies in a duly addressed envelope with postage prepaid to Eugene J. Cella, Esq., and Franklyn J. Wollett, Esq., attorneys of record herein, The Comptroller's Office, The Capitol Building, Tallahassee, Florida 32301;

2. On Florida Bankers Association, Amicus Curiae, by mailing three copies in a duly addressed envelope with postage prepaid to its counsel of record, J. Thomas Cardwell, Esq. of Akerman, Senterfitt and Eidson, 17th Floor, CNA Building, Post Office Box 231, Orlando, Florida 32802;

3. On The New York Clearing House Association, Amicus Curiae, by mailing three copies in a duly addressed envelope with postage prepaid to its counsel of record, John L. Warden, Esq., H. Rodgin Cohen, Esq., and Robert D. Owen, Esq., of Sullivan and Cromwell, 125 Broad Street, New York, New York 10004;

4. On Conference of State Bank Supervisors, Amicus Curiae, by mailing three copies in a duly addressed envelope with postage prepaid to its counsel of record, Erwin N. Gris-

wold and James F. Bell, of Jones, Day, Reavis and Pogue, 1735 Eye Street, N.W., Washington, D.C. 20006.

All parties required to be served have been served.

MATHEWS, OSBORNE, EHRLICH,
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Counsel of Record for Appellees,
BT Investment Managers, Inc. and
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1. The pertinent portion of Fla. Stat. § 659.141(1) (1972 Supp.) provides:

659.141 Control; ownership.—

(1) Except as provided in subsection (3) of this section, no bank, trust company, or holding company, the operations of which are principally conducted outside this state, shall acquire or retain, directly or indirectly, all or substantially all the assets of, or control over, any trust company having a place of business in this state where trust business or functions are conducted, or acquire or retain all or substantially all of the assets of, or control over, any business organization having a place of business in this state where or from which it furnishes investment advisory services to trust companies or banks in this state.***

2. The pertinent portion of 12 U.S.C. § 1841(b) (1976) provides:

(b) "Company" means any corporation, partnership, business trust, association, or similar organization, or any other trust unless by its terms it must terminate within twenty-five years or not later than twenty-one years and ten months after the death of individuals living on the effective date of the trust, but shall not include any corporation the majority of the shares of which are owned by the United States or by any State.

12 U.S.C. § 1841(c) (1976) provides:

(c) "Bank" means any institution organized under the laws of the United States, any State of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans. Such term does not include any organization operating under section 25 or section 25(a) of the Federal Reserve Act, or any organization which does not

do business within the United States except as an incident to its activities outside the United States. "District bank" means any bank organized or operating under the Code of Law for the District of Columbia.

3. The pertinent portion of 12 U.S.C. § 1842 (1976) provides:

§ 1842. Acquisition of bank shares or assets—Prior approval of Board as necessary; exceptions; disposition, time extension; subsequent approval or disposition upon disapproval.

• • •

Limitation by State boundaries

(d) Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest.

4. 12 C.F.R. § 225.4(b)(1) (1978) provides:

§ 225.4 Nonbanking activities.

(b)(1) *De novo entry.* A bank holding company may engage de novo (or continue to engage in any activity earlier

commenced de novo) directly or indirectly, solely in activities described in paragraph (a) of this section, 45 days after the company has furnished its Reserve Bank with a copy of a notice of the proposal (in substantially the same form as FR Y-4A) published within the preceding 30 days in a newspaper of general circulation in the communities to be served, unless the company is notified to the contrary within that time or unless it is permitted to consummate the transaction at an earlier date on the basis of exigent circumstances of a particular case. If adverse comments of a substantive nature are received by the Reserve Bank within 30 days after the company has so published its proposal or if it otherwise appears appropriate in a particular case, the Reserve Bank may inform the company that (i) the proposal shall not be consummated until specifically authorized by the Reserve Bank or by the Board or (ii) the proposal should be processed in accordance with the procedures of paragraph (b)(2) of this section.